No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.

Filed this.....day of August, 1915.

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By.....Deputy Clerk.

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STATEMENT.

The plaintiff in error was convicted on July 14, 1914, of the crime of an assault with intent to commit rape, upon the body of a female passenger, Mary Elizabeth Young, while she was on board the American steamer "Beaver" on the high seas. The plaintiff in error was later sentenced to serve a term of four years at McNeil Island where he now is.

The record shows that plaintiff in error was an employee of the steamer, to wit, a waiter, and it was customary for such employees to assist and in fact to alone attend the necessary wants of seasick female passengers.

This plaintiff in error, in conjunction with others, was charged by this lady with having criminally assaulted her while she was in an extremely helpless condition caused by seasickness and general physical infirmities. The sufficiency of the evidence is not challenged except in one or two particulars hereinafter noted.

The case appears to be a simple one and little if any difficulty should, in our opinion, stand in the way of an affirmance of the judgment.

DEFINITION OF CRIME.

Counsel contended on demurrer to indictment and again here renews his contention, that the statute of the United States touching the crime of rape is insufficient in that it fails to set out therein the particular ingredients necessary to constitute the offense. The statutes are as follows:

Penal Code, Sec. 276:

> "Whoever shall assault another with intent to commit a murder or rape, shall be imprisoned not more than twenty years."

Sec. 278:

> "Whoever shall commit the crime of rape shall suffer death."

The Constitution, Article I, Section 8, Subdivision 10, defining the power of Congress in criminal legislation is as follows:

> "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

The doctrine that the federal courts have no common law jurisdiction is well settled and we have no fault to find with the decisions cited to this effect, (see brief of counsel, pp. 4-9) the substance of which decisions may all be summed up in this language of the Supreme Court:

> "The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction."
>
> United States v. Hudson, 7 Cranch, 32, 3 L. Ed. 260.

The entire set of cases cited by counsel go no further than this doctrine.

The cases relied on by counsel are found in his opening brief, pages 4 to 11.

GOVERNMENT'S POSITION.

It is the position of the Government that Congress has declared rape and assault to commit rape to be crimes and has declared the court that shall have jurisdiction of them and has also in effect declared that the common law definition of rape shall be the crime denounced by the statute. This doctrine seems to be well settled, yes it seems to have been well settled for more than one hundred years. Hundreds and probably thousands of cases

have been prosecuted under this and similar statutes with not even so much as a suspicion of the alarming situation urged by counsel. I should think a strong showing should be made to upset a settled practice of more than a century.

If there is no federal law on the crime of rape neither is there any law of the various kinds of assault, for which prosecutions daily are occurring in the federal courts of the United States. Indeed, if no law exists against this most dastardly of all classes of crime, then indeed we as a nation have been most lax in our duty.

But we take it that the law is well and thoroughly settled that when Congress denounces a crime that the common law may be resorted to for a definition. Indeed, if the common law may not in our system be resorted to for a definition of legal terms, we would be in a hopeless condition.

Take the question of murder itself. Our statute says that "murder is the unlawful killing of a human being with malice aforethought". Where shall we go to find a definition of the words "unlawful" and "malice aforethought"? There is no place to go except to the common law.

If we may go to the common law for these definitions why may we not accept the well understood common law definition of rape?

The situation is well explained by Clark on Criminal Law (second edition, page 427) as follows:

> "Though the federal courts derive no jurisdiction from the common law, yet where congress has conferred jurisdiction of a crime in general terms, without defining it, they may look to the common law for its definition. Thus, an act of congress declares murder, manslaughter, rape, and other crimes upon the high seas or in certain specified places to be crimes punishable in the federal courts, but does not define those crimes."

Mr. Wharton (eleventh edition) Vol. I, p. 370, states the rule as follows:

> "While, therefore, it is settled that the federal courts have no jurisdiction of offenses not declared to be such by federal statute, yet, as these statutes mostly designate offenses by title, leaving their definition to the common law, it is the common law that is the final arbiter as to what such offenses are."

In Volume 5 of Encyclopedia of United States Supreme Court Reports, at page 56, we have the following language:

> "A statute may define and punish an offense by its common law name; and the common law definition will be applied by both the federal and state courts."

citing,

United States v. Smith, 5 Wheat. 153, 159; 5 L. Ed. 57;

Benson v. McMahon, 127 U. S. 457, 466; 32 L. Ed. 234;

Wright v. Henkel, 190 U. S. 40, 59; 47 L. Ed. 948;

United States v. Palmer, 3 Wheat. 610; 4 L. Ed. 471;

United States v. Carll, 105 U. S. 611; 26 L. Ed. 1135;

Pettibone v. United States, 148 U. S. 197, 203, 37 L. Ed. 419;

In re Kollock, 165 U. S. 526, 41 L. Ed. 813.

"By giving it a name known to the common law, a crime is not less clearly ascertained than it would be by using the definition as found in the treatise of the common law. In fact, by such a reference, the definition is necessarily included, as much as if it stood in the text of the act. That is certain which is, by necessary reference included in that term. That is certain which is, by necessary reference, made certain.

United States v. Smith, 5 Wheat. 153, 159; 5 L. Ed. 57;

In re Kollock, 165 U. S. 526, 533; 41 L. Ed. 813, citing

United States v. Eaton, 144 U. S. 677; 36 L. Ed. 591; and

Caha v. United States, 152 U. S. 211, 38 L. Ed. 415."

Counsel insists that United States v. Smith, supra, is to be distinguished from the case at bar in that murder and robbery are well understood and defined crimes and that robbery, the charge in the Smith case, was only one class of piracy and had the offense been for any other act than murder or robbery the statute would have been inoperative. I cannot see the force of this argument. The decision is squarely to the point that piracy "as defined by the law of nations" is of itself a sufficient statutory definition. The law of nations is a part of the common law. This entire decision is to

the effect that piracy is a well understood term in the law and is a sufficient definition of the offense.

Rape is certainly a well understood crime at common law and Congress intended it to have its common law definition.

As above stated this doctrine is too well fortified and too well understood to be ignored or set aside at this late day in our history when technicalities do and should play only a small part in our system for the suppression of crime.

EVIDENCE AND INSTRUCTIONS.

Counsel quotes a small fragment of the evidence and then asserts that plaintiff in error did not possess the required intent, because the woman became in such a condition she could no longer resist.

How weak is this contention in the face of the real facts, a few of which will now be pointed out.

1st. This woman was a stranger aboard a vessel on the high seas in the darkness of the night with a violent storm raging.

2nd. She was a frail little woman having had a capital operation and deathly seasick as well.

3rd. She was without protection of any kind from the management of the vessel and was solely at the mercy of the plaintiff in error.

4th. She stated that she also feared that she might be thrown overboard by defendant in error.

5th. This defendant in error, her sole protector, after behaving indecently in the way of forcibly undressing the woman, returned and coming into the stateroom, locked the door, told her it would do no good to cry out, and forcibly struggled with her in bed and a description of it is too vile for print and I refer the court to the testimony of witness (Trans. pp. 11 to 14).

6th. Everything, including the condition of undergarment, corroborates the witness and the only reason plaintiff in error did not do more was that his animal force had spent itself.

And yet in face of these facts counsel says that no proof appeared warranting the verdict.

We submit the sufficiency of the proof is self-evident.

Complaint is made of two instructions refused upon request.

In so far as the instructions were law and appropriate they were fully covered and explicitly given by the court as follows:

> "To constitute the crime of assault with intent to commit rape, the assault must have been made with the intent to commit rape, notwithstanding all possible resistance that could be made, and with the resolve on the part of the party charged to use all force necessary to carry out his designs. The intent must have been to perpetrate the crime at all events, regardless of what the party upon whom the

assault is made might or could do to prevent it. There is a wide distinction between an assault with intent to commit rape and an assault with intent to have improper connection by means of persuasion, blandishments, etc., but without the use of force. Such an assault does not constitute the offense here charged. But if the defendant did make such assault upon the person of Mary Elizabeth Young, at the time and place alleged with the intent to have unlawful carnal knowledge of her by force and against her will, and with the resolve on his part to use all force necessary to carry out his design, the offense of assault with intent to commit rape was then complete, and such offense could not be affected by any subsequent abandonment of the attempt, or by any subsequent modification of the intent. But if the jury believe that defendant did make an assault upon the said Mary Elizabeth Young, with intent to have sexual intercourse with her, the fact, if it be a fact, that she resisted him until she was no longer able to resist, or that she became exhausted, and that thereupon, the defendant voluntarily abandoned further effort without accomplishing sexual intercourse will be considered and weighed by the jury in determining whether or not the defendant did have the intent to have unlawful carnal knowledge of the said Mary Elizabeth Young by force and against her will, and the resolve to use all necessary force to accomplish his design.

The intent hereinbefore described, is an essential element of the offense charged, and you must acquit the defendant unless you find the existence of such intent beyond a reasonable doubt.

The intent need not, however, be found for any fixed period of time before the act is committed. It is sufficient if it coexists with the

> commission of the act. The intent or purpose with which a given act is committed is to be gathered from all the attendant circumstances, and need not be shown by any open declamation of the party charged that such was his intent. It may be deduced from all the circumstances shown in the evidence, including all acts done or statements made by the defendant, if you find there were any such. It is to be gathered by the jury from those sources by applying their reasons and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to find from these sources beyond a reasonable doubt the existence of the intent which is essential to constitute the offense, it satisfies the law and is sufficient, if other elements are shown, to sustain guilt."

The intent to use force, like any other fact in the case, may be inferred from the circumstances.

The case of Mills v. United States, 164 U. S. 644; 41 L. Ed. 584, lends no comfort to the position of plaintiff in error. That decision holds that "where the woman's will or resistance had been overcome by threats or fright, or she had become helpless or unconscious" no resistance of any kind is required.

Again the California Supreme Court in case of People v. Stewart, 97 Cal. 238, distinguishes or rather explains People v. Fleming, 94 Cal. 308, and holds (syllabus):

> "Where the conduct of a defendant charged with an assault with intent to commit rape is

> shown to have been such, at the time of the alleged assault, as to indicate that his mind was bent upon using whatever force upon the female would be necessary to accomplish the consummation of his desires, the evidence is sufficient to support a conviction of the offense, and the fact that he abandoned his intentions before the consummation of the act, by reason of the approach of other parties, or by reason of the pains of a stricken conscience, will not purge him of the legal consequence of his criminal conduct."

From the above it is clear that the court followed the rules of law accurately.

The proposed instructions do not deal with elements of fear, fright and helplessness on the part of the prosecutrix caused by acts, threats, and force used by plaintiff in error and in the form proposed the court would have been justified anyway in refusing them.

NATIONALITY OF VESSEL.

Plaintiff in error contends that it was not shown that the vessel was an American vessel and cites the testimony of the purser, A. G. Ravenhill (Trans. p. 31) to the effect that he was purser on the night of the crime and that they were on the high seas off the coast of Oregon and that the "Beaver" is an American vessel. Counsel thinks that failure to use "was" instead of "is" is fatal to proof of venue.

We submit that no person reading the context would fail to know that examination was directed to date of crime and not date of trial.

Besides, no counter-showing was made or attempted and moreover none but American vessels could engage lawfully in coastwise trade.

FOURTH POINT.

Plaintiff in error urged that he should have been allowed to reopen the case after same was closed and give in evidence his underwear (see p. 37). This of course is a discretionary matter. Besides, witness identified no underwear. She only stated that she would recognize the kind of underwear plaintiff in error wore (Trans. p. 12).

The record shows that the district attorney stated to the court that he had excused the jailer as a witness and that he had gone and that by witness he would show that underwear mentioned was not the underwear worn by the plaintiff in error at the time complained of.

We submit the cause should be affirmed.

Dated, San Francisco,
August 18, 1915.

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.